In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No.

LOUIS FLEISH,
Petitioner,

vs.

JAMES A. JOHNSTON, Warden, United States Penitentiary, Alcatraz Island, California,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit, hereinafter called "Appellate Court", is reported in 145 F. (2d) 16, and is also printed in full in the record (R. 13-16).

JURISDICTIONAL STATEMENT.

Petitioner hereby refers to and incorporates herein the "Jurisdictional Statement" and the "Reasons Relied Upon for Allowance of Writ", as same appear in the foregoing petition.

STATEMENT OF MATTER INVOLVED.

In the foregoing petition for writ of certiorari, petitioner has set forth all that is material to the consideration of the questions presented, and he hereby refers to, adopts and makes same a part of this brief.

SPECIFICATION OF ERRORS.

Petitioner believes that the Appellate Court erred in the following particulars:

1. In its construction of 26 U.S.C.A. 1132d and 1132e, the said Court erred in holding that the Trial Court had power to sentence petitioner separately upon Counts 3, 12, 15, 18 and 21 of the indictment after it had sentenced him upon Count 1 thereof;

2. The said Court erred in finding (by inference) that petitioner had not served his sentence under Count 1 of the indictment.

ARGUMENT.

Summary: Petitioner contends that he committed but one punishable offense, the maximum penalty for which was five years' imprisonment and a $2000.00 fine (26 U.S.C.A. 1132m, printed verbatim in the Appendix), and that he has served the only sentence of imprisonment which lawfully could have been imposed for one punishable offense. The theory upon which this contention is based will be developed in two phases (but only to the extent required to support the reasons relied on for the allowance of the writ of certiorari, a more comprehensive development of the merits being reserved until such time as this Court shall see fit to grant the foregoing petition therefor): first, the offenses charged in Counts *3*, 12, 15, 18 and 21 constituted one indivisible offense; second, the offenses charged in Counts 1 and *3* constituted one indivisible offense.

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1. THE OFFENSES CHARGED IN COUNTS 3, 12, 15, 18 AND 21 CONSTITUTED ONE INDIVISIBLE OFFENSE.

It will be recalled that County 3 (R. 6) alleged that petitioner, at a certain time and place, possessed a firearm without registering it; that Counts 12, 15, 18 and 21 (R. 6-8) alleged that petitioner, at the same time and place, possessed four other firearms without registering them. All counts were based upon 26 U.S.C.A. 1132d (printed in Appendix). The Trial Court sentenced petitioner to imprisonment for a term of twenty-five years for this single and simultaneous possession of five different firearms which had not been registered (R. 3).

In the case of *Braden v. United States,* 270 F. 441 (C.C.A. 8th, 1920), the statute forbade the possession of "any of the aforesaid drugs". Defendant was sentenced separately on four counts, each of which alleged his possession, at the same time and place, of a different type of drug. The court held that the sentences on three of the counts were invalid, stating that, although the government contended that the words "any of the aforesaid drugs" permitted it to base a count upon each drug possessed,

> "We do not think that any such significance can be given to the word 'any'. The use of this word simply means that, if the defendant under the required circumstances should be found in possession of any of said drugs, he would be guilty. If a person steals four horses from the barn of another, all being of different color, it would not be competent to charge the thief with four different larcenies when the horses were all taken at the same time and place. Another illustration would be the larceny of articles of merchandise from a store. If twelve articles were all taken at the same time and place, we do not think it would be competent to charge the thief with twelve different larcenies."

This decision has been cited twenty-four times since its rendition; it has never been modified, reversed, limited, or expressly overruled; it was approved in *Roark v. United States,* 17 F. (2d) 570 (C.C.A. 8th, 1927), in *Parmagini v. United States,* 42 F. (2d) 721 (C.C.A. 9th, 1930), in *Ex parte Lagomarsino,* 13 Fed. Supp. 947 (D.C., Calif., 1936), and in *Johnston v. Lagomarsino,* 88 F. (2d) 86 (C.C.A. 9th, 1937).

In *Parmagini v. United States,* 42 F. (2d) 721 (C.C.A. 9th, 1930), the statute forbade the concealing of "any such narcotic drug". Defendant was sentenced to pay separate fines on two counts, each of which charged that he concealed a different drug at the same time and place. The court (which is also the Appellate Court in this case) held that a fine should have been imposed on one of the counts only, for the reason that there was but one offense involved:

> "Where opium and morphine were concealed in a single package, only one offense is committed by such concealment regardless of the fact that more than one narcotic drug is contained in the package. Braden v. U.S. * * * It follows that the punishment for concealing morphine and opium in this case were for the same offense * * *."

This decision has been cited in eleven instances. It has never been modified or reversed, limited or expressly overruled. It has been approved in *Ex parte Lagomarsino,* 13 Fed. Supp. 947 (D.C., Calif., 1936).

In *Johnston v. Lagomarsino,* 88 F. (2d) 86 (C.C.A. 9th, 1937), the statute forbade the taking of "any letter, postal card, package, bag or mail". Defendant was sentenced separately on three counts, each of which charged the taking of a different parcel of mail matter (presumably at the same time and place). The court (which again is the Appellate Court) held that sentences on two of the counts were invalid:

> "While every presumption must be indulged in favor of the judgment and sentence, * * * but where upon the face of the record it is disclosed that the offense charged involved several separate

> articles, not charged as separately taken, but which may have been simultaneously and continuously taken, a different relation obtains. Suppose a flock of sheep is stolen as one act. May the thief be punished for stealing each sheep simultaneously and continuously driven away? * * * To take several letters from a mail depositary simultaneously and continuously is one act and comprehends one intent."

This decision has not been modified or reversed, criticized, limited, expressly overruled, or questioned. It was approved and followed in *Colson v. Johnston,* 35 Fed. Supp. 317 (D.C., Calif., 1940).

In *Robinson v. United States,* 143 F. (2d) 276 (C.C.A. 10th, 1944), the statute forbade the transportation in interstate commerce of "any woman * * * for the purpose of prostitution". Defendant was sentenced separately on (a) counts 2 and 3, and (b) count 4, each count having charged that he transported in interstate commerce, at the same time and place, a different woman for the purpose of prostitution. The court remanded the case to the trial court with instructions to resentence defendant on the basis of a single offense:

> "Unlawful transportation is the gist of the offense. * * * Here, the transportation was a single, continuous act and the offense was completed when the transportation crossed the state line. As to each woman the offense commenced and ended simultaneously. * * * If a person drove a vehicle to the barn of another and * * * loaded into the vehicle 25 sacks of corn, * * * and carried it away with the intent permanently to deprive the

> owner of the possession thereof, such person would be guilty of a single larceny, although he loaded each sack into the vehicle separately and had an unlawful intent as to each sack of corn."

The Appellate Court made absolutely no allusion in its opinion (R. 13-16) to any one of the four authorities cited above (*Braden v. United States, Parmagini v. United States, Johnston v. Lagomarsino, Robinson v. United States*). Instead, the said court chose to rely upon two decisions, *Ebeling v. Morgan,* 237 U.S. 625, 59 L.Ed. 1151 (1915) and *McKee v. Johnston,* 109 F. (2d) 273 (C.C.A. 9th, 1939), neither of which was in point.

Thus, in *Ebeling v. Morgan,* supra, this Court held that the *successive* cuttings of several mail bags constituted several separate offenses. Petitioner does not contest the correctness of such decision: where forbidden acts are not done *at the same time,* the principles which he urges have no application. In petitioner's case, the possessions of the firearms were simultaneous.

Again, in *McKee v. Johnston,* supra, there were *successive* takings from different mail bags, and it was properly held that each taking constituted a separate offense. The Court was careful to distinguish the case from *Johnston v. Lagomarsino,* 88 F. (2d) 86 (C.C.A. 9th, 1937), where it was held to be but one offense to take several letters from a mail depositary *simultaneously.*

2. THE OFFENSES CHARGED IN COUNTS 1 AND 3 CONSTITUTED ONE INDIVISIBLE OFFENSE.

Assuming that Counts 3, 12, 15, 18 and 21 are held to constitute one indivisible offense, the latter four of them shall be deemed to have been merged into Count 3 for purposes of punishment, and this supporting brief will proceed upon the theory that the only remaining counts to be dealt with are Counts 1 and 3.

It will be recalled that Count 1 (R. 5) charged that petitioner, at a certain time and place, received and possessed a firearm which had been transferred without payment of tax (26 U.S.C.A. 1132e, printed in Appendix); that Count 3 (R. 6) charged that petitioner, at the same time and place, possessed the *same* firearm without registering it (26 U.S.C.A. 1132d, printed in Appendix). The Trial Court sentenced petitioner to imprisonment for two terms of five years each for this single possession of the same firearm.

In determining the identity of offenses, the test to which resort is most commonly had is the "same-evidence" test (*Burton v. United States,* 202 U.S. 344, 50 L. Ed. 1057, 1906; *Gavieres v. United States,* 220 U.S. 338, 55 L. Ed. 489, 1911; *Morgan v. Devine,* 237 U. S. 632, 59 L. Ed. 1153, 1915). Since its origination in England in the eighteenth century, this test has been stated in various forms, but the form appearing in *Corpus Juris Secundum, Criminal Law,* section 279, is representative:

> "One test is to ascertain whether the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first, or

> whether *the same evidence would sustain a conviction in each case.* Thus, if the evidence which is necessary to support the second indictment was admissible under the former, was related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar; * * *." (Italics supplied).
>
> "Under the test given it is evident that a prosecution under one indictment will bar a prosecution under another for the same offense, notwithstanding a variance in the facts alleged in the two indictments, if it is not essential to a conviction under either indictment to prove the fact on which the variance hinges, * * *."

In order to make an application of the "same-evidence" test to this case, it is necessary to ascertain the elements of the charged offenses. Count 1 (26 U.S.C.A. 1132e) alleged that petitioner received and possessed a firearm upon which the transfer tax had not been paid; Count 3 (26 U.S.C.A. 1132d) alleged that petitioner, at the same time and place, possessed the same firearm without registering it. *Query,* would the evidence which was required to prove Count 1 also have proved Count 3? Stated another way, would the same evidence have sustained a conviction on each Count? If so, both Counts charged the "same offense" within the meaning of the Fifth Amendment to the Federal Constitution.

This Court, in *Rossi v. United States,* 289 U. S. 89, 77 L. Ed. 1051 (1933), has answered these questions in favor of petitioner. There, one count alleged that the

defendants carried on a distilling business without having given the bond required by the statute; another count charged that defendants possessed a still which had not been registered. There was evidence to show that defendants controlled a still, but there was no affirmative evidence of their failure to give the bond or to register the still:

> "The United States claim that in such circumstances the burden of proof to show execution of the bond and registration of the still rested upon the petitioners. * * * And with this view we agree."
>
> "The lower federal courts generally have accepted the doctrine that proof of the custody or control of a still for unlawful distillation of alcoholic spirits is enough to give rise to an inference of lack of registration and failure to give bond which the defendant must overcome by proof."
>
> "The general principle, and we think the correct one, underlying the foregoing decisions is that *it is not incumbent on the prosecution to adduce positive evidence to support a negative averment* the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control." (Italics supplied.)

This Court, in enunciating the foregoing doctrine, merely crystallized a rule which had theretofore prevailed in all courts.

Gee Woe v. United States, 250 F. 428 (C. C. A. 5th, *1918*);

Faraone v. United States, 259 F. 507 (C. C. A. 6th, *1919*);
McCurry v. United States, 281 F. 532 (C. C. A. 9th, *1922*);
Goodfriend v. United States, 294 F. 148 (C. C. A. 9th, *1923*);
Montague v. United States, 294 F. 277 (C. C. A. 9th, *1923*);
Giacolone v. United States, 13 F. (2d) 108, (C. C. A. 9th, *1926*);
Taylor v. United States, 19 F. (2d) 813 (C. C. A. 8th, *1927*);
Martinez v. United States, 25 F. (2d) 303 (C. C. A. 5th, *1928*);
Sauvain v. United States, 31 F. (2d) 732 (C. C. A. 8th, *1929*).

Under the National Firearms Act (26 U.S.C.A. 1132-1132q, 1934 Edition), it has been recognized that the requirements of registration, written order and the like are negative averments within the meaning of *Rossi v. United States,* supra (*Crapo v. United States,* 100 F. (2d) 996, C. C. A. 10th, 1939).

In the proceeding now before this Court, the government made out a complete case under Counts 1 and 3 when it proved the receipt and possession of the single firearm. It was not required to prove the negative averments that the transfer tax had not been paid or that there was a failure to register. Therefore, upon the same evidence, petitioner was convicted and sentenced upon each Count.

The Appellate Court, in holding that Counts 1 and 3 described separate offenses, made no reference to the "same-evidence" test nor to *Rossi v. United States,* supra, and thereby failed to apply several pertinent authorities of this Court.

The said holding of the Appellate Court is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Lewis v. United States,* 4 F. (2d) 520 (1925), where defendant was sentenced separately on a count which charged that he possessed certain liquor with intent to sell it without a permit and upon another count which charged that, at the same time, he possessed the same liquor with intent to transport it without a permit. The court held that the imposition of separate sentences was error:

> "Unlawful possession is but one offense. It is necessary to allege intent, whether to sell or to transport, but only to make it appear that the possession is unlawful. * * * There should have been but one sentence for the unlawful possession * * *"

This decision has not been reversed, modified, distinguished, criticized, or expressly overruled. In the case at bar, the offense charged in each count was an unlawful possession; it was only one offense, whether the unlawfulness arose from the failure to pay the tax or the failure to register.

The decision of the Appellate Court is also in conflict with the decision of the Circuit Court of Appeals

for the Eighth Circuit in the case of *Roark v. United States,* 17 F. (2d) 570 (1927), where the statute forbade any person to cause a woman to be transported for purposes of prostitution, debauchery or any other immoral purpose. Count 1 of the indictment charged that defendant caused a woman to be transported for the purpose of having illicit intercourse; count 3, that defendant, at the same time, caused the same woman to be transported for the purpose of prostitution. Defendant was sentenced separately on each count, and the upper court reversed the sentence as to count 3:

> "It is one theory of this indictment that, if a person has but one immoral purpose, he is guilty of one crime, and is guilty of as many more crimes as he may have immoral purposes. We do not think that the act is susceptible of that interpretation. A violation of * * * (the) section is a violation, whether the transportation was for one of the purposes named or all of them. It is the obtaining * * * the transportation for one or more of the immoral purposes which is condemned, and not the having in mind of such immoral purpose or immoral purposes at the time the transportation is obtained * * *."

This decision has not been modified, reversed, distinguished, criticized, or expressly overruled. It has been followed in *Caballero v. Hudspeth,* 114 F. (2d) 545 (C. C. A. 10th, 1940). In the case at bar, a violation of the statute is a violation, whether the possession is illegal for one or all of the reasons named therein. Petitioner submits that it is the unlawful *possession* which is the gravamen of the offense, and

not the particular reason or reasons *because* of which the possession is unlawful.

The decision of the Appellate Court is also in conflict with another decision of the Circuit Court of Appeals of the Tenth Circuit, this time in the case of *Caballero v. Hudspeth,* 114 F. (2d) 545 (1940). There, the statute forbade the transportation of any woman for the purpose of prostitution or any other immoral practice. Defendant was sentenced separately on counts charging, first, the transportation of a woman with intent to compel her to engage in prostitution and, second, at the same time and place, the transportation of the same woman with intent to cohabit unlawfully with her. The court held that the separate sentences imposed double jeopardy:

> "It seems clear that what is prohibited is the transportation in interstate commerce of any female person for any of the interdicted purposes. One transportation constitutes but a single offense, whether the accused had in mind one or more of the prohibited purposes."

This case has not been modified, reversed, distinguished or expressly overruled. The single transportation was illegal for two different reasons, just as petitioner's single possession was illegal for two different reasons, and the court found but one punishable offense.

The decision of the Appellate Court is in conflict with one of its own decisions—that of *Dimenza v. Johnston,* 130 F. (2d) 465 (1942), where the statute provided that whoever, in robbing a bank by force

and violence, should jeopardize the life of any person, should suffer a certain penalty. Defendant had been sentenced separately on three counts of the indictment: count 2 alleged that defendant robbed a bank by force and violence and jeopardized the life of A; count 3, that, in the same robbery, he jeopardized the life of B; count 4, that, in the same robbery, he jeopardized the life of C. The court held that but one offense was charged in the three counts:

> "Petitioner also contends that the second, third, and fourth counts in the indictment, differing only in that each named a different person as the one placed in jeopardy by the same robbery with deadly weapons, were duplications of a single offense of robbing a bank and jeopardizing the life of 'any person' by the use of deadly weapons."
>
> "We conclude that the sentence on count two covered the entire crime described in counts * * * two, three and four * * *."

In the case at bar, the pertinent sections of the statute may be summarized thusly: Whoever, in possessing a firearm, acquires such possession prior to the payment of the transfer tax or fails to register same, shall suffer a certain penalty. In other words, the crime alleged was the *possession* of a firearm *contrary to law*. The singleness of the robbery in *Dimenza* and the singleness of the possession in the instant case demand equal singleness of punishment.

CONCLUSION.

No attempt has been made to set forth all of the authorities in support of the principal question presented in the foregoing petition, namely, that the Appellate Court erred in holding that the Trial Court had power to sentence petitioner separately upon Counts 3, 12, 15, 18 and 21 after it had sentenced him upon Count 1. Nor has any argument whatever been advanced upon behalf of the second question presented by the said petition, namely, that the Appellate Court erred in finding (by inference) that petitioner had not served his sentence under Count 1. These are matters strictly pertinent to the merits of petitioner's basic petition for writ of habeas corpus and they have no direct bearing upon the reasons relied upon for the allowance of the requested writ of certiorari.

Petitioner sincerely believes that the arguments made in this brief for the purpose of inducing this Court to grant the said writ of certiorari are sufficient in law and fact; that they demonstrate several sound bases permitting the intervention of this tribunal of last resort, which judicial body can quiet the specified conflicts in the various Circuits and at the same time apply its own decisions in the *Burton, Gavieres, Morgan* and *Rossi* cases.

It is therefore respectfully submitted that this cause is one requiring the exercise by this Court of its supervisory powers, in order that the errors herein pointed out may be corrected and that the law may be properly and authoritatively defined; that the decree of the Appellate Court should be reversed, in order that

justice may be done to petitioner; and that, to such an end, a writ of certiorari should be granted and that this Court should review and finally reverse the decree of the said Appellate Court.

Dated, San Francisco, California,
December 20, 1944.

LOUIS S. BEEDY,
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JOHN BENNETT KING,
Of Counsel.

(Appendix Follows.)